

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2019-362-A

IN RE:)	
Rulemaking for the Public Service)	
Commission to Create a New Regulation)	
103-811.5 Role of the Qualified,)	DOMINION ENERGY SOUTH
Independent Third-Party Consultant or)	CAROLINA, INC.’S COMMENTS TO
Expert and the Commissioners’ Reliance on)	THE PROPOSED RULEMAKING
the Contents of the Qualified, Independent)	
Third-Party Consultant’s or Expert’s Report)	

Dominion Energy South Carolina, Inc. (“DESC” or the “Company”), by and through its undersigned counsel, pursuant to Rule 103-818 of the Rules and Regulations of the Public Service Commission of South Carolina (the “Commission”), hereby submits these comments in the above-captioned rulemaking proceeding, which concerns the role of qualified, independent third-party consultants or experts in proceedings before the Commission, and the Commission’s reliance on the content of reports produced by such consultants or experts, pursuant to S.C. Code Ann. § 58-41-20(I).

Through these comments, DESC seeks to ensure that the role of the qualified, independent third party is clearly defined by the proposed regulation, and that its role in future proceedings adheres to the requirements of S.C. Code Ann. § 58-41-20(I), and also protects the parties’ due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 22 of the Constitution of the State of South Carolina, and the South Carolina Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310 *et seq.* To that end, DESC believes that the adoption of the regulatory language proposed by Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively, “Duke”) in Docket No. 2019-289-A as subsections (F) and

(G) to that regulation would substantially accomplish these goals, and urges the Commission to adopt and include that language in the regulation proposed by this docket. For reference, the provisions proposed by Duke as subsections (F) and (G) in Docket No. 2019-289-A are attached hereto as Exhibit A and incorporated herein by this reference.¹

RECOMMENDATIONS

Section 58-41-20(I) states, in part, that:

The commission shall engage, for each utility, a qualified independent third party to submit a report that includes the third party's independently derived conclusions as to that third party's opinion of each utility's calculation of avoided costs for purposes of proceedings conducted pursuant to this section. The qualified independent third party is subject to the same ex parte prohibitions contained in Chapter 3, Title 58 as all other parties. The qualified independent third party shall submit all requests for documents and information necessary to their analysis under the authority of the commission and the commission shall have full authority to compel response to the requests. The qualified independent third party's duty will be to the commission. Any conclusions based on the evidence in the record and included in the report are intended to be used by the commission along with all other evidence submitted during the proceeding to inform its ultimate decision setting the avoided costs for each electrical utility.

S.C. Code Ann. § 58-41-20(I). Additionally, section 58-41-20(A)(2) mandates that the “[p]roceedings shall include an opportunity for intervention, discovery, filed comments or testimony, and an evidentiary hearing.”

¹ On November 8, 2019, Duke submitted its “Joint Comments of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC” in Docket No. 2019-289-A, which set forth both its proposed regulatory language, as well as its reasoning and authorities supporting the amendments it proposed. DESC supports and adopts those comments for the purposes of this rulemaking proceeding. DESC notes that, in response to Duke's comments, Commission staff originally incorporated Duke's proposed changes and filed the amended proposed Rule 103-811 with the South Carolina Legislative Council. However, at a hearing on January 29, 2020, Commission staff proposed removing sections (F) and (G) from proposed Rule 103-811 in light of the Commission's establishment of this docket, which was opened for the specific purpose of addressing the role of the qualified, independent third-party consultant or expert and the Commission's reliance on the consultant or expert's report.

As an initial matter, DESC notes that the statute envisions a third-party consultant who submits its own independent analysis showing an appropriate avoided cost calculation for each utility, rather than a report that simply restates the testimony of the parties and then selects a position with which it most agrees. Bare expert opinions without underlying supporting facts are of no consequence and cannot be considered. *See S.C. Cable Television Ass'n v. Pub. Serv. Comm'n of S.C.*, 313 S.C. 48, 53, 437 S.E.2d 38, 40–41 (1993) (“We caution the PSC that its decisions must be based on facts in evidence and not merely on expert opinions which are not supported by facts.”). Put another way, the role of the independent third party is not meant to be that of an alternative decision maker providing conclusions as to the credibility of witness testimony, *see Newkirk v. Enzor*, No. CV 2:13-1634-RMG, 2017 WL 823553, at *4 (D.S.C. Mar. 2, 2017) (excluding testimony of an expert as improper that simply bolstered the credibility of a witness), determinations as to whether or not parties have met evidentiary burdens, or other legal determinations, *see Hermitage Indus. v. Schwerman Trucking Co.*, 814 F. Supp. 484, 484 (D.S.C. 1993); rather, the third party’s appropriate role under the statute is to provide independent analysis, informed by relevant knowledge and experience, as to an appropriate avoided cost calculation for each utility.

The statute makes clear that proceedings conducted pursuant to section 58-41-20 must “include an opportunity for intervention, discovery, filed comments or testimony, and an evidentiary hearing.” § 58-41-20(A)(2). This statutory language echoes the procedural due process rights of parties to any administrative proceeding in South Carolina, which fundamentally include “notice, an opportunity to be heard in a meaningful way and judicial review.” *See Kurchner v. City of Camden Planning Comm’n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008); S.C. Const. art. I, § 22 (“No person shall be finally bound by a judicial or quasi-judicial decision of an administrative

agency affecting private rights except on due notice and an opportunity to be heard . . . nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.”). The Supreme Court of South Carolina has further held that “these rights include a reasonable opportunity to cross examine the important witnesses against a party when their credibility is challenged.” *Spartanburg v. Parris*, 251 S.C. 187, 190, 161 S.E.2d 228, 229 (1968). And the South Carolina Administrative Procedures Act further mandates that, in a contested proceeding, any information offered for inclusion into the record should be subject to objection and cross-examination and comply with the rules of evidence. S.C. Code Ann. § 1-23-330.

Based on these authorities, as well as the additional authorities cited by Duke in its November 8, 2019 comments in Docket No. 2019-289-A, DESC submits that the regulation should ensure that parties to a proceeding under section 58-41-20 have the ability to propound written discovery to the independent third-party expert, depose the expert, call the expert to testify at any hearing held during the proceedings, and cross examine the expert about its work in the case, its methods, and its conclusions. These procedures, which are routinely employed with respect to experts in contested cases, will increase transparency in proceedings held under section 58-41-20, and allow both the parties and the Commission a full and fair opportunity to understand and test the methods and conclusions of the expert. While DESC submits that such procedures are required by section 58-41-20 and fundamental guarantees of procedural due process, they will also aid in the decisional process and assist the parties, the Commission, and the public in understanding the conclusions reached by the third-party expert, and in evaluating the reliability of, and the appropriate weight to give to, those opinions.

DESC also supports and concurs with the other provisions offered by Duke in Docket No. 2019-289-A prohibiting the third-party expert from engaging in *ex parte* communications with the Commission and its staff, and requiring the third-party expert to submit a proposed procedural schedule for the timing of the development and issuance of its report. DESC believes that such provisions will again ensure compliance with the mandates of section 58-41-20, and also provide clear guidelines and procedures with respect to the work of the third-party expert.

CONCLUSION

Based on the foregoing, DESC respectfully requests that the Commission adopt the regulatory language proposed by Duke in Docket No. 2019-289-A as subsections (F) and (G) (also attached hereto as Exhibit A) for the purposes of the regulation being considered in this docket, and adopt any other provisions necessary and appropriate for carrying out the requirements of section 58-41-20 and protecting the due process and other constitutional rights of parties of record appearing before the Commission.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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